Filed 3/6/19 Shawn S. v. Superior Court CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SHAWN S.,

Petitioner,

v.

THE SUPERIOR COURT OF KERN COUNTY,

Respondent;

KERN COUNTY DEPARTMENT OF HUMAN SERVICES,

Real Party in Interest.

F078437

(Super. Ct. No. JD138370-00)

OPINION

THE COURT[*]

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Louie L. Vega, Judge.

Shawn S., in pro. per., for Petitioner.

No appearance for Respondent.

Margo A. Raison, County Counsel, and Jennifer E. Feige, Deputy County Counsel, for Real Party in Interest.

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[*] Before Detjen, Acting P.J., Peña, J. and Snauffer, J.

Petitioner Shawn S. and Carl H. (her husband) are the adoptive parents of Camden and Felix, half brothers of Baby Girl V., the subject of these dependency proceedings. In September 2018, the juvenile court terminated the parental rights of Baby Girl V.'s mother, Brenda, and designated the foster parents, Mr. and Mrs. H., the baby's prospective adoptive parents. In October 2018, petitioner filed a Welfare and Institutions Code section 388[1] petition requesting placement, which the court denied. Petitioner sought extraordinary writ review of the juvenile court's placement decision (§ 366.28, subd. (b)(1)), asserting the court abused its discretion. We conclude petitioner lacks standing to challenge the denial of her section 388 petition and dismiss the petition.

PROCEDURAL AND FACTUAL SUMMARY

Baby Girl V. (the baby) was born prematurely in February 2018 with a positive toxicology screen for methamphetamine. The Kern County Department of Social Services (department) placed a protective hold on the baby at the hospital where she remained for two weeks. At approximately three weeks of age, she was placed in the care of Mr. and Mrs. H. After leaving the hospital, Brenda made no attempt to visit the baby or keep in contact with the department. She was unable to identify the baby's father.

Brenda had five other minor children who were not in her custody, including Camden (born Daniel V. in April 2012) and Felix (born Baby Boy V. in July 2016), who were adopted by petitioner and her husband in May 2013 and November 2017, respectively, and resided in Virginia.

By March 2018, the department had completed the adoption review and deemed the baby appropriate for adoption planning. It reported that no relatives had applied for

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1 Statutory references are to the Welfare and Institutions Code.

placement and the H.'s were interested in adoption. In addition, several of the bypass provisions[2] applied to Brenda because of her untreated drug abuse.

In April 2018, the juvenile court adjudged the baby a dependent child and set the matter for disposition. That month, the baby's maternal grandmother, who lived in Arizona, contacted the department expressing an interest in placement. A social worker mailed her a placement application.

At the dispositional hearing in May 2018, the juvenile court denied Brenda reunification services and set a section 366.26 hearing for September 13, 2018.

On August 20, 2018, the H.'s filed a request for de facto parent status, which the court set for hearing. On August 31, 2018, petitioner filed a JV-285 form "Relative Information," informing the juvenile court she submitted a placement application and wanted custody of the baby. She faulted the department for her delay in applying, asserting it notified her of the baby's birth three months after the baby's detainment and refused to provide the baby medical coverage as required under the Interstate Compact on the Placement of Children (ICPC). Camden and Felix enjoyed monthly FaceTime visits with the baby arranged by petitioner and were excited about having a baby sister. Petitioner believed it would be in the baby's best interest to be placed with her brothers.

The department recommended the juvenile court terminate Brenda's parental rights and free the baby for adoption by the H.'s. The maternal grandmother was approved for placement but there were concerns about her financial ability to care for the baby and her noncitizen status, which prevented her from adopting or obtaining legal guardianship in Arizona. Petitioner's ICPC application was pending approval.

On September 13, 2018, the juvenile court terminated Brenda's parental rights and granted the H.'s request for de facto parent status. The court placed the baby in the care,

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[2] Section 361.5, subdivision (b) allows for the denial of reunification services under certain circumstances, commonly referred to as "bypass" provisions.

custody and control of the county adoption agency. On September 24, the court designated the H.'s the baby's prospective adoptive parents.

On October 2, 2018, petitioner filed a modification petition under section 388, asking the juvenile court to place the baby with her. As changed circumstances, she cited the approval of her ICPC application on September 25, 2018. The baby and her brothers had developed a loving relationship through their FaceTime visits and petitioner and her husband believed it was in the baby's best interests to grow up with her biological siblings. Petitioner claimed the department thwarted her efforts to gain custody of the baby, first by not notifying petitioner of her birth. After petitioner and her husband adopted Camden and Felix, they expressed their desire to take custody of any additional children Brenda might deliver and expected to be notified if she did. However, she was not notified of the baby's birth until May 23, 2018. On June 5, petitioner spoke to the baby's social worker who told her the baby was already bonded to the H.'s and the preadoptive assessment had been completed. Petitioner believed the department had already decided the H.'s would get custody of the baby. In addition, Kern County refused to provide the baby medical coverage, which delayed the approval of her ICPC application. She was very concerned the H.'s would not allow postadoption contact. Although the H.'s were initially very amenable to allowing petitioner contact with the baby, they stopped communicating once they realized she was pursuing custody. Petitioner asked the court to consider her request for placement in light of the obstacles created by the department.

In November 2018, petitioner filed a second JV-285, again asserting the department failed to notify her the baby was detained and disregarded her status as the baby's relative. She additionally faulted the department for failing to expedite her ICPC application, arrange sibling FaceTime visits and an overnight visit for them in California, conduct a team meeting to consider placement with them, and request a continuance of the section 366.26 hearing pending approval of her ICPC application.

The department opposed petitioner's section 388 petition, asserting the relative placement preference did not apply after parental rights were terminated and the juvenile court no longer had placement authority.

On November 19, 2018, the juvenile court conducted a hearing on the section 388 petition. The court denied the petition, finding it could not grant the relief sought.

DISCUSSION

Petitioner contends the department violated section 309, subdivision (e)(1) by not timely notifying her the baby was detained. That breach as well as the juvenile court's failure to grant her relative placement preference, she argues, requires reversal of all orders subsequent to disposition, including the order terminating parental rights, and an order placing the baby in her care. We disagree.

When a social service agency first removes a child from parental custody, section 309, subdivision (e)(1) requires the agency to conduct an investigation within 30 days to identify and locate "all grandparents, parents of a sibling of the child, if the parent has legal custody of the sibling, adult siblings, and other adult relatives of the child, as defined in paragraph (2) of subdivision (f) of Section 319, including any other adult relatives suggested by the parents."[3] The social worker shall provide notice to all adult relatives of the child and an explanation of the various options to participate in the care and placement of the child. (§ 309, subd. (e)(1)(A) & (B).)

Section 361.3 requires that preferential consideration be given to certain relatives who request placement after the child is ordered removed from parental custody at the

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[3] The definition of "relative" was previously set forth in former section 319, subdivision (f)(2), which defined "relative" as "an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words 'great,' 'great-great,' or 'grand,' or the spouse of any of these persons, even if the marriage was terminated by death or dissolution." The same definition is now contained in section 319, subdivision (h)(2).

dispositional hearing or thereafter when a new placement of the child is necessary. (§ 361.3, subds. (a), (d).) The only relatives accorded preferential consideration are adult grandparents, aunts, uncles or siblings. (§ 361.3, subd. (c)(2).) "Preferential consideration" means that the relative seeking placement shall be the first placement to be considered and investigated. (§ 361.3, subd. (c)(1); *In re Sarah S.* (1996) 43 Cal.App.4th 274, 285-286 [preferential consideration places the relative at the head of the line when the court is determining which placement is in the child's best interests].) However, the relative placement preference established by section 361.3 does not constitute "a relative placement *guarantee*." (*In re Joseph T.* (2008) 163 Cal.App.4th 787, 798.)

As a parent of the baby's siblings, petitioner was entitled under section 309, subdivision (e)(1) to notice of the baby's detention and information about seeking placement. However, at no time was she entitled to preferential placement consideration because she does not fall within the designated relative categories. By the time petitioner was notified and initiated placement efforts, the baby had been in the H.'s custody for two months. She was bonded to them and they wanted to adopt her. Further, the department did not hinder petitioner's efforts to pursue placement. Petitioner was allowed to video chat with the baby, so the siblings could bond. In addition, the department continued monitoring her as a potential placement option by keeping the juvenile court apprised of her application status. However, in the absence of a placement request by a relative entitled to placement preference and the court's decision not to offer Brenda reunification services, there was no reason for the court not to proceed to permanency planning. At the hearing in September 2018, the court terminated parental rights and placed the baby in the care and custody of the county.

After termination of parental rights, a juvenile court may not disturb a social services department's placement decision unless that decision constitutes an abuse of discretion. Section 366.26, subdivision (j) provides that, once the juvenile court has

terminated parental rights and referred a child for adoptive placement, the social services department "shall be responsible for the custody and supervision of the child and shall be entitled to the exclusive care and control of the child at all times until a petition for adoption … is granted, except as specified in subdivision (n)."[4] The department's discretion, however, is not unfettered. The juvenile court retains jurisdiction over the child until he or she is adopted, and thus may review the department's exercise of its discretion as to posttermination placement. (§ 366.3, subds. (a), (d), (e).) The court may not substitute its independent judgment for that of the department. Instead, the court may only overturn the department's decision as to the child's placement pending adoption if the department has abused its discretion in making or maintaining the placement. (*Los Angeles County Dept. of Children etc. Services v. Superior Court* (1998) 62 Cal.App.4th 1, 10.) "Absent a showing that [the department's] placement decision is patently absurd or unquestionably not in the minor's best interests, the [juvenile] court may not interfere and disapprove of the [minor's] placement," thereby requiring that the minor be relocated to another home. (*Department of Social Services v. Superior Court* (1997) 58 Cal.App.4th 721, 724-725.)

Following termination of parental rights, petitioner sought to effect a placement change by filing a modification petition under section 388. Section 388 permits a party to petition the juvenile court to change its prior orders based upon a change of circumstances. The party seeking the change must demonstrate both that a change of circumstances exists and that the proposed change of court order is in the child's best

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4 The only exception to agency discretion specified in section 366.26, subdivision (j) (i.e., the limitation on agency discretion stated in § 366.26, subd. (n)) did not apply in this case. Section 366.26, subdivision (n), limits an agency's discretion to remove a child from the home of a prospective adoptive parent. It did not limit the department's discretion in this case to determine the baby should stay in the home of Mr. and Mrs. H.

interests. (§ 388, subd. (a)(1).) We review the denial of a section 388 petition for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

"Generally, an aggrieved party may appeal a judgment in a juvenile dependency matter. [Citation.] To be aggrieved, a party must have a legally cognizable interest that is injuriously affected by the court's decision." (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1053.) "The right of appeal … extends by statute only to a 'party aggrieved' by the order appealed from." (*In re Aaron R.* (2005) 130 Cal.App.4th 697, 703.) "Not every party has standing to appeal every appealable order. Although standing to appeal is construed liberally, and doubts are resolved in its favor, only a person aggrieved by a decision may appeal. [Citation.] An aggrieved person, for this purpose, is one whose rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision." (*In re K.C.* (2011) 52 Cal.4th 231, 236.)

Here, we cannot conclude petitioner was an aggrieved party. She sought through her section 388 petition to force the baby's removal from the H.'s and placement with her and her husband on the premise the department's delay in notifying her deprived her the opportunity to assert her relative placement status. However, petitioner had no right to have the baby placed with her. As explained above, she was not entitled to the relative placement preference. Consequently, she cannot show that her rights to the baby were affected in an "immediate" and "substantial way." (*In re K.C., supra,* 52 Cal.4th at p. 236.) As such, she cannot show she was an aggrieved party.

Further, assuming petitioner had standing, she failed to show how the department abused its discretion in placing the baby with the H.'s and how it was in the baby's best interest to place the baby with her. Petitioner had no relationship with the baby whereas the H.'s had been caring for the baby virtually since birth. The baby was bonded to them and they were offering a permanent home through adoption. Were we to consider the merits of the petition, we would find no abuse of discretion.

DISPOSITION

The petition is dismissed.